IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD.,

Petitioners,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT,

Respondent.

CERTIORARI TO CIRCUIT COURT OF APPEALS 7th CIRCUIT

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

OFFICIAL REPORT OF OPINIONS DELIVERED IN COURTS BELOW.

There is no reported opinion of the District Court.

The opinion rendered by the Circuit Court of Appeals for the Seventh Circuit is reported—

> *South Chicago Coal & Dock Co. et al., appellees,* v. *Bassett, Deputy Commissioner, appellant* (C. C. A.) 104 F. (2d) 522 (June, 1939) (copy of opinion in record (R. 84-92)).

Jurisdictional Grounds.

The respondent awarded compensation against petitioners (employer and insurance carrier) because of the death of John Schumann, a deck hand on a vessel.

The compensation award made by the Deputy Commissioner purports to be founded on powers under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, ch. 509, 44 Stat. 1424-1446, 33 U. S. C. A. ch. 18, Secs. 901-950 Pocket Suppl.

(See Appendix, p. 59.)

Jurisdiction of Federal Courts to review such compensations orders and enjoin them is given by Sec. 21 of such Act, 44 Stat. 1436, 33 U. S. C. A. ch. 18, Sec. 921 Pocket Suppl.

(See Appendix, p. 61.)

Jurisdiction of this court on certiorari is given by Act of Mar. 3, 1891, ch. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, ch. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347.

The judgment of the Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on May 11, 1939 (R. 92), a petition for rehearing was filed (R. 93) and was denied on June 6, 1939 (R. 109). The petition for certiorari and brief were presented August 4, 1939, and certiorari granted October 9, 1939.

A case under which this court took jurisdiction to review a case under Longshoremen's and Harbor Workers' Compensation Act, is

Crowell v. *Benson*, 285 U. S. 22.

STATEMENT OF THE CASE.

Suit was filed by petitioners in the District Court of the United States for the Northern District of Illinois asking for a permanent injunction, and that a compensation order made by the respondent in his capacity as Deputy Commissioner, asserted by him to be pursuant to the Longshoremen's and Harbor Workers' Compensation Act, might be set aside, and his findings be set aside. The award was because of the death of a deck hand, John Schumann. It was found by the Deputy Commissioner that the deceased, John Schumann, and the petitioner were persons comprehended within the terms of said Act as employer and employee under the terms of such Act and compensation was awarded (Award R. 44). The District Court by perpetual injunction, upon final hearing, set aside the award (Decree R. 71-2). The Circuit Court of Appeals reversed such decree (R. 92) and denied a rehearing (R. 109).

The petitioner, South Chicago Coal & Dock Company, was alleged in the Bill of Injunction to have been the operator of the described steam vessel the Koal Kraft; and the other petitioner, the insurance carrier.

The bill alleged the character of the vessel in question, which was 312 net tons, and approximately 159 feet in length, 37 feet beam, and 10 feet draft. The Koal Kraft was engaged in fueling vessels and Schumann was employed on it as a deck hand at the time of his death (R. 3).

It is alleged that Schumann came to his death on October 31, 1937, by drowning in the Calumet River, while employed on the vessel as a deck hand and that he was

one of the crew of said vessel, consisting of five persons. The vessel operated in Calumet River and Calumet Harbor and Indiana Harbor, and confined its operations within the navigable waters of the United States, in the states of Indiana and Illinois (R. 3).

Attached to the bill and made a part of it were the claim for compensation (Ex. A, R. 6); the transcript of the evidence produced before the Commissioner (Ex. B, R. 8); the order and award for compensation (Ex. C, R. 43).

The answer filed by the defendant raises only one ultimate issue, and that is, a denial that John Schumann was a member of the crew of a vessel. The answer says to the contrary he was a laborer on the barge Koal Kraft (R. 46).

It is alleged in the answer that Schumann signed no ship's articles; no living quarters were provided for him; and that while the vessel was discharging coal, his duty was to keep the coal running in the hoppers up on deck with a pole; that he had no duties to perform while the vessel was in motion; and the answer denies that he was outside of the compensation provisions of the Longshoremen's and Harbor Workers' Compensation Act, and asserts jurisdiction existed in the Commissioner (R. 46).

On the *de novo* hearing in the District Court the petitioners produced oral evidence of the master of the vessel, Arthur J. Spotton (R. 47), and Raymond Kersten a fireman from the vessel (R. 54). All the exhibits attached to the bill of complaint (proceedings before Deputy Commissioner) were admitted in evidence by agreement, and there was a stipulation that the allegations of the bill as to the answer filed before the Commissioner are correctly recited (R. 60).

All the evidence was preserved in a stenographic report of the testimony taken (R. 47 *et seq.*)

By stipulation, and on motion of the respondent, all the proceedings before the Deputy Commissioner were considered and stipulated as being in evidence (R. 60) and there was produced in court, in addition to the foregoing, the Certificate of Inspection by the Steamboat Inspectors, prescribing a crew for the vessel, styled "Plaintiffs' Exhibit 1" (R. 65). This was offered in evidence (R. 48) together with evidence that regulations of Vessel Inspectors establish the makeup of an essential crew (R. 58-59).

Except for the formal introduction of the Certificate of Inspection which had not been formally offered before the Commissioner, although its contents were recited (R. 41-42) and which was offered in evidence at the trial before the court (R. 48) and received in evidence, the evidence before the Deputy Commissioner and that produced before the court was substantially the same (R. 59).

The evidence which is uncontradicted and was produced before the Deputy Commissioner and before the court is as follows:

The proven facts are that the vessel Koal Kraft was a duly licensed vessel of the United States (R. 61). She was operated pursuant to a certificate prescribing her crew (R. 65). The Koal Kraft engaged in coaling other ships by receiving coal from the coal docks of the petitioner, South Chicago Coal & Dock Company, and transferring such coal by machinery to such other ships. (Dep. Com. R. 17—Dist. Ct. R. 48, 57.) It was a fuel lightering business. (Dep. Com. R. 13—Dist. Ct. R. 48.) The Koal Kraft was 159 feet long, 37 feet 6 inches broad, had a draft of 10 feet or a little over, and was of 376 gross tons,

310 net tons. (Dep. Com. R. 14—Dist. Ct. R. 47, 65.) The Koal Kraft was licensed to operate in waters between Illinois and Indiana (R. 66) and operated in the Calumet River and Harbor and in the Indiana Harbor and River. (Dep. Com. R. 13—Dist. Ct. R. 48, 66.) Its work was seasonal for about eight months of the year. (Dep. Com. R. 22.)

On October 31, 1937, when Schumann was lost off the vessel it was proceeding from its dock at 95th Street on the Calumet River (Dist. Ct. R. 53) to the steamer J. S. Ashley, moored at 103rd Street and the Calumet River. (Dist. Ct. R. 50.) The distance was in the neighborhood of a mile. (Dist. Ct. R. 53.) The course taken was thru and in a navigable stream. (Dist. Ct. R. 53.) On the day of Schumann's death he was on the ship when it left the coal dock at 95th Street. (Dep. Com. R. 37—Dist. Ct. R. 50, 52, 55.) When the vessel reached 103rd Street, Schumann was missing. (Dist. Ct. R. 50.) The master of the ship next saw his body five days later after the coast guard had fished him out of the river at 95th Street. (Dist. Ct. R. 50.) He was then dead from drowning. (Dist. Ct. R. 50.)

The Koal Kraft was inspected annually by the steamboat inspectors of the United States Government. (Dep. Com. R. 14.) The inspectors issued a certificate of inspection prescribing how many men were required to operate that vessel and the certificate called for a total crew of six men. (Dep. Com. R. 41.) The ship under its certificate was not allowed to work continuously more than twelve hours out of every twenty-four hours with such prescribed crew. (Dep. Com. R. 36—Dist. Ct. R. 65.) [NOTE: The requirements contained in the certificate were testified to in the hearing before the Deputy Commissioner (R. 41-42). The certificate itself was produced at the trial in the Dis-

trict Court (R. 65, 48).] The certificate so produced contained among other things, the following applicable to the vessel in question:

> "May be operated not to exceed 12 hours out of any 24 hours with 1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman." (Dist. Ct. R. 65, 48.)

The master of the Koal Kraft had held that particular job for twelve years. (Dep. Com. R. 14.) Men working on the ship stayed in their jobs pretty steadily. (Dep. Com. R. 19.) Schumann was called every time the rest of the crew were called during the time he was employed. (Dep. Com. R. 21.) There was one man, a fireman, who was there eleven years (Dep. Com. R. 19, 21) and another man who had been on the ship five or six years. (Dep. Com. R. 19.) Kersten, who had held the job to which Schumann succeeded when Kersten was promoted to be fireman, had been working on the ship for five years. (Dep. Com. R. 21-22.) All of the members of the crew working on the ship were hired by the master. (Dep. Com. R. 16—Dist. Ct. R. 51.)

On the day when Schumann was lost, there were five men on the boat besides the master, consisting of an engineer, a fireman, and three deck hands, one of whom was Schumann. (Dep. Com. R. 15—Dist. Ct. R. 48-49.) Schumann began work on the ship October 5, 1937 and was lost October 31, having worked during the intervening period of twenty-six days. (Dep. Com. R. 18—Dist. Ct. R. 49, 57.) The master had a license to operate a ship in these navigable waters. (Dep. Com. R. 41.) The engineer was required to have a license. (Dist. Ct. R. 57.) The fireman was not required by regulations to have a license. (Dist. Ct. R. 57). Deck hands signed no papers.

In operating a local boat in the harbor or rivers they do not sign articles. (Dep. Com. R. 18.) Crews of ships sailing the Great Lakes operating between different ports on different lakes (not confined to waters of adjoining states) do sign articles. (Dep. Com. R. 18.) (See law applicable, as hereinafter set out.) Had not Schumann or someone in his place been included in the crew as one of the three seamen required, the Koal Kraft might not lawfully have left the dock with coal for delivery to its customer's ship. (Dep. Com. R. 41-42—Dist. Ct. R. 54.) There was never a time when the Koal Kraft operated with less than three deck hands or laborers on board. (Dist. Ct. R. 53.)

Schumann was hired and paid as a deck hand as a member of the crew of the Koal Kraft. (Dep. Com. R. 16.) He was doing labor work on the ship and was known as a deck hand. (Dep. Com. R. 28-29, 34.) Such men are classified as seamen right away upon employment. (Dist. Ct. R. 51.) There are two classes of seamen on a vessel, ordinary and first class seamen (Dist. Ct. R. 50), and Schumann was an ordinary seaman employed to do deck work. Laborers on vessels are called ordinary seamen. Ships do not have laborers besides such ordinary seamen. (Dist. Ct. R. 50-51.) The words seamen and deck hand are synonymous (Dist. Ct. R. 52), all decks hands are called ordinary seamen. (Dist. Ct. R. 52.)

Schumann's work consisted in part of handling the ship's lines, both in mooring and in casting off. (Dep. Com. R. 16, 17, 32—Dist. Ct. R. 49, 55, 58.) Throwing a heaving line is an act of seamanship which the other men teach a new man. (Dep. Com. R. 21.) Schumann assisted the fireman in operating a steam winch thru which ran the mooring lines. (Dep. Com. R. 17, 35—Dist. Ct. R. 57.) He scrubbed, painted and otherwise cleaned the deck and

other parts of the vessel. (Dep. Com. R. 18, 33, 35, 37-38, 40—Dist. Ct. R. 51, 55, 58.) He also cleaned up the deck removing loose coal. (Dep. Com. R. 33—Dist. Ct. R. 55, 58.)

One of Schumann's duties was to watch the conveyor mechanism, and with a long stick or prod help keep the coal moving along the conveyor. (Dep. Com. R. 20, 31, 35, 36, 38, 40—Dist. Ct. R. 50, 52, 55, 56, 58.) The duties of a deck hand on a ship of this sort are just general labor, keeping it clean, handling the lines, painting or whatever he is asked to do. (Dep. Com. R. 18, 27.) Schumann did no work except on the ship. (Dep. Com. R. 21, 28.) Practically all Schumann's work was done on the ship. (Dist. Ct. R. 49.) He did no work on the dock with respect to handling coal. (Dist. Ct. R. 49.) When handling the lines of a ship it was done both on the ship and on the dock. (Dep. Com. R. 16, 22—Dist. Ct. R. 49, 55, 56, 58.)

In most cases the ship was in transit about forty-five minutes between the dock where it received its coal and the vessel which it coaled. (Dist. Ct. R. 56.) It took about twenty minutes to transfer the coal to the ship to which it was going, depending upon the amount of coal ordered. (Dist. Ct. R. 56.) Schumann had nothing to do while the ship was in transit until he reached the ship to be coaled (Dep. Com. R. 21, 38—Dist. Ct. R. 53), except for emergency work in case of a breakdown. (Dep. Com. R. 38, 39.) He was a part of the movement of the ship. (Dep. Com. R. 33.) The usual procedure on reaching the ship to be coaled was to tie up alongside first. (Dist. Ct. R. 57.) This would take about five minutes. (Dist. Ct. R. 57.)

Schumann was not furnished sleeping quarters on the vessel (Dep. Com. R. 17—Dist. Ct. R. 4) nor was he furnished with food. (Dist. Ct. R. 49.) He lived in his

own home. (Dep. Com. R. 25-26.) He came on duty either upon call by telephone or at a time of which he was previously notified. (Dep. Com. R. 20-21—Dist. Ct. R. 49.) This was the course with reference to all of the crew. (Dep. Com. R. 21—Dist. Ct. R. 49.) He was paid only for the time he was actually engaged in work and was not paid while at home awaiting call. (Dist. Ct. R. 53.)

The result of the hearing before the Deputy Commissioner was an award and a finding that Schumann was not a member of the crew and was under the Compensation Act. (R. 43-44.) On the trial of the case before the District Court, petitioners not only produced Exhibit B a transcript of the hearings had before the Deputy Commissioner (R. 8-42), but also produced witnesses and evidence to sustain their bill of complaint. (R. 45-62.) The evidence of witnesses before the District Court was substantially the same as that before the Deputy Commissioner.

No objection was made by the attorneys for the respondent at the trial before the District Court to production of evidence there that the case could be tried only upon the record made before the Deputy Commissioner. (R. 47 *et seq.*)

The District Court rendered conclusions of law three in number (R. 69), as follows:

1.

"Under the evidence herein, the court finds as a matter of law that the 'Koal Kraft' was required to have a crew of thirteen men, but was permitted to operate not to exceed twelve hours out of any twenty-four, with a crew of one licensed master and pilot, one licensed chief engineer, three seamen, and one fireman."

2.

"Plaintiff, South Chicago Coal & Dock Company, is not liable for the payment of any compensation under the 'Longshoremen's and Harbor Workers' Compensation Act' (44 Statutes, 1424; 33 USCA, Chap. 18), for the death of John Schumann."

3.

"Under the law, a member of the crew of a vessel is not, nor is the owner of such vessel, subject to the jurisdiction of the Commissioner or Deputy Commissioner under 'Longshoremen's and Harbor Workers' Compensation Act,' justifying any award of compensation for the death of a deck hand, a member of the crew, and no jurisdiction existed in the Deputy Commissioner to make any award of compensation for the death of John Schumann."

The court also made nine specific findings of fact (R. 70-71) that:

1.

"On October 31, 1937, John Schumann came to his death by drowning in the Calumet River while employed by the plaintiff, South Chicago Coal & Dock Company, on its vessel, the 'Koal Kraft.'"

2.

"The drowning of John Schumann occurred by reason of his being lost from the vessel, 'Koal Kraft,' while it was navigating the Calumet Harbor and River, navigable waters of the United States."

3.

"John Schumann, at the time of his being lost, was employed by the plaintiff, South Chicago Coal & Dock Company, as a deck hand on the vessel 'Koal Kraft,' and as such his duties consisted in making lines fast, loosing them, keeping the vessel clean, and various duties incident to fueling vessels, in which trade the said vessel was at that time engaged."

4.

"John Schumann, during his employment by the plaintiff, South Chicago Coal & Dock Company, performed the duties of a deck hand aboard the vessel 'Koal Kraft' and at the time of his being lost therefrom, the said vessel was being navigated in the Calumet River between the plaintiff's (South Chicago Coal & Dock Company) dock at 95th Street and the Calumet River, north of the 95th Street bridge in Cook County, Illinois, and the vessel 'Ashley,' then lying at 104th Street and the Calumet River in said Cook County, Illinois. John Schumann was lost from the 'Koal Kraft' after it had passed to the south of the 95th Street bridge and before it reached the 'Ashley.'"

5.

"John Schumann, at the time of his being lost from the 'Koal Kraft,' was a seaman employed thereon as a deck hand."

6.

"On October 31, 1937, the said vessel was being operated not to exceed 12 hours of that day, and the members of the crew, at the beginning of the voyage during which John Schumann was lost overboard,

were Arthur J. Spotton, Master; Harry Zivney, Engineer; John Schumann, Joe Kete and George Gornick, deck hands; and Raymond Kersten, Fireman."

7.

"John Schumann, at the time of his being lost from the vessel 'Koal Kraft,' was a member of the crew of that vessel. (Held)"

8.

"John Schumann, at the time of his coming to his death by drowning, was not within the coverage of the 'Longshoremen's and Harbor Workers' Compensation Act.' (44 Statutes 1424; 33 USCA Chap. 18.)"

9.

"The steamship 'Koal Kraft' was, at the time of the death of John Schumann, a vessel of the United States engaged in harbor navigation, with a crew and ship's papers."

Pursuant to the conclusions of law and findings of fact the District Court made permanent and perpetual the preliminary injunction or injunctional order theretofore issued; decreed that payments already made to Schumann's widow should not be recovered. The award of compensation was vacated and set aside and the defendant was permanently restrained and enjoined from attempting to enforce payments under the award. (R. 72.)

The Circuit Court of Appeals for the Seventh Circuit reversed the decree of the District Court upon the following grounds:

That the status of Schumann as a seaman or as a longshoreman was not a jurisdictional, fundamental fact en-

titling the District Court to consider and determine it but the finding of the Deputy Commissioner was binding upon the court; that a liberal construction of the Compensation Act was proper not only as to matters relating to a claim but also as to the applicability of the Compensation Act;

That the exception contained in Section 3 of the Act with respect to non-applicability to a master or member of a crew stood in the same position as other provisions of Section 3 making compensation not payable because of drunkenness or suicide;

That the result of the case would be the same whether or not the District Court was entitled independently to determine the question whether or not Schumann was a member of the crew;

That even upon the *de novo* evidence the undisputed facts established that Schumann had a non-seaman status; that the word "crew" as used in the certificate of inspection had a different meaning from the same word used in the statutory exception because of the purely incidental relation which the seaman's duties bore to navigation and the fact that his principal duties were those of an ordinary laborer who happened to be working on shipboard. (See Opinion of C. C. A., R. 84-92.)

The Circuit Court of Appeals gave no consideration to the provisions of Section 2 of the Compensation Act defining an employee; reviewed the evidence taken before the Deputy Commissioner and from that evidence reached the conclusion that the Deputy Commissioner's decision that Schumann was not a member of the crew and hence not excluded from the Act was a correct decision.

Assigned Errors Relied Upon Herein (R. 114-115).

Petitioners specify that they rely upon assigned errors as follows (numbers refer to formal assignments of error as numbered):

The Court of Appeals erred in reversing the decree of the District Court;

(1) Instead of affirming it;

(2) In dismissing the bill for injunction filed by plaintiffs;

(3) In holding that the Deputy Commissioner had jurisdiction to make an award for the death of John Schumann;

(4) In holding that he was not a member of the crew of the steamer Koal Kraft;

5) In holding that the District Court was not entitled to hear the case *de novo;*

(6) In finding error in conduct of trial *de novo,* whereas no objection was made on the trial to the fact that the case was heard anew;

(7) In holding that the crew-membership status of deceased was not jurisdictional in character;

(8) In holding that such status was not a question of employer-employee relationship of a jurisdictional kind;

(9) In holding that the question whether he was a member of the crew did not present a jurisdictional question of employer-employee relationship to be independently determined by the District Court on a review of an award under Longshoremen's and Harbor Workers' Compensation Act.

SUMMARY OF ARGUMENT.

I.

A Deputy Commissioner has no jurisdiction under Longshoremen's and Harbor Workers' Compensation Act to award compensation for death of a deck hand, employed by the master, and performing ordinary duties of a deck hand upon an enrolled vessel of the United States, operating in the waters of two adjacent States.

Under the definitions of the Act a member of the crew is not an "employee" within the powers of a Deputy Commissioner to make a compensation award.

(a) Any person who is one of a ship's company is a member of a crew.

United States v. *Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740.

The Bound Brook, (D. C.) 146 F. 160.

The Marie (D. C.), 49 F. 286, 287.

The Buena Ventura, (D. C.) 243 F. 797.

In re Meyer, (D. C.) 74 F. 881.

Jones v. *Shepherd Deputy Comm.*, 20 Fed. Supp. 345.

(b) The jurisdiction of the Deputy Commissioner rests in the status of employer and employee as defined in the Act. An "employee," as defined in the Act, is one who is neither a master nor a "member of a crew of a vessel." Respecting a master or member of a crew of a vessel, no jurisdiction or power exists in the Deputy Commissioner

make an award of compensation for their injuries or eath.

Sec's 1, 2, 3 Act March 4, 1927 Ch. 509, 44 Stat. 1424; 33 U. S. C. A. Chap. 18, Sec's 901-2-3, Pocket Supplement.

Crowell v. *Benson*, 285 U. S. 22, 49, 50, 63.

Interstate Commerce Commission v. *Humboldt Steamship Company*, 224 U. S. 474, 484.

Ellis v. *United States*, 206 U. S. 246.

Maryland Casualty Co. v. *Lawson, Dep. Com'r., et al.*, 94 F. (2d) 190.

Lawson, Dep. Com'r., et al. v. *Maryland Casualty Co.*, 94 F. (2d) 193.

Kibadeaux v. *Standard Dredging Co.*, 81 F. (2d) 670.

(c) Shipping articles are not required by law nor employed respecting a vessel operating in the waters of a ngle State or of two adjoining States. A want of shipng articles in the case of employment of deceased has no gnificance.

Rev. St. 4520; 46 U. S. C. A. Ch. 18, Sec. 574.

Burdett v. *Williams*, 27 F. 113, 117.

Thorson v. *Peterson*, 9 F. 517.

The Lilly, 69 F. (2d) 898.

U. S. v. *The Brig Grace Lothrop*, 95 U. S. 527, 532.

The John Martin, Fed Cas. No. 7357, 13 Fed Cas. 694, 2 Abb. U. S. 172 (1870).

3 Kent's Commentaries 177, note (b).

(d) The steamer Koal Kraft was a licensed vessel the United States subject to inspection, Certificate of essel Inspectors, and designation by them of complement crew. She was a "vessel," as that term is used in the

Longshoremen's Act. The certificate of the inspectors has the force of law.

Leathem, Smith-Putnam Navigation Co., et al., v. *National Union Fire Ins. Co., et al.*, 96 F. (2d) 923, 927.

II.

The statute gives a plenary right of review of an award "if not in accordance with law." Inferences contrary to undisputed facts may not be sustained.

The District Court did not commit reversible error in trying the issues *de novo*.

(a) Issue was made in the pleadings whether or not deceased Schumann was an employee under the Act.

Bill of Complaint, R. 3-4-9.

Answer, R. 46.

(b) No objection was made to the hearing *de novo* in the District Court.

R. 47-60.

(c) The evidence before the Deputy Commissioner and the evidence before the District Court were substantially the same.

R. 59 (Statement of respondent's counsel).

R. 84-89 (Opinion of C. C. A.).

Therefore the procedural question is not important.

Taylor v. *McManigal*, 80 F. 2nd 583 (C. C. A. 6th Cir.).

(d) The case having been tried by the parties in the trial court upon the theory of propriety of a trial *de novo*, an inconsistent assertion may not be made on appeal.

3 Corp. Jur. 718, Sec. 618.

4 Corp. Jur. Sec. 465, Sec. 241 (a).

(e) Trial *de novo* was the proper method of procedure.

Crowell v. *Benson*, 285 U. S. 22.

III.

Findings of fact and conclusions of law held by the District Court not challenged by assertion of error by respondent on appeal to the Circuit Court of Appeals stand as the conceded facts and law of the case.

Such uncontradicted and conceded findings of fact and conclusions of law require that the judgment of the Circuit Court of Appeals be reversed and the judgment of the District Court reinstated.

(See Argument.)

Crowell v. *Benson*, 285 U. S. 22.

IV.

The opinion of the Circuit Court of Appeals rests upon erroneous conclusions and declarations of law.

See Argument.

Crowell v. *Benson*, 285 U. S. 22, 47.

ARGUMENT.

I.

John Schumann was not an "employee" for the death of whom the Deputy Commissioner had jurisdiction to award compensation under the Longshoremen's and Harbor Workers' Compensation Act.

The Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, chap. 509, Secs. 1-50, 44 Stat. 1424-1446; 33 U. S. C. A. chap. 18, Secs. 901-950 Pocket Supplement) is a compensation act providing in Section 3 for compensation "in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States."

It further provides that:

> "No compensation shall be payable in respect of the disability or death of—(1) a master or a member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net."
>
> March 4, 1927, chap. 509, sec. 3, 44 Stat. 1426, 33 U. S. C. A. chap. 18, sec. 903.

By the immediately preceding Section 2 (Subsec. 3, under the caption "definitions") it is provided that:

> "Definitions. When used in this chapter • • •
>
> (3) "The term 'employee' does not include a master or member of a crew of any vessel, nor any person

engaged by the master to load or unload or repair any small vessel under 18 tons net."

March 4, 1927, Chap. 509, Sec. 2, 44 Stat. 1424, 33 U. S. C. A. chap. 18, sec. 902, subsec. 3.

The statute by its terms does not extend to every employee, but where the term "employee" is used in the Act, it is expressly defined in the Act by the statement that such term does *not* include a "member of a crew of any vessel."

The principal question involved on this review, and to which all other questions are largely subsidiary, is whether John Schumann was an employee within the Act and, therefore, whether the Deputy Commissioner had jurisdiction to award compensation for his death.

The statute itself contains a definition of an employee under the Act—for the sole power of the Deputy Commissioner in any case is to award compensation, and the only compensation, to award which he has jurisdiction, is defined in Sec. 2, paragraph 12 (Mar. 4, 1927, Chap. 509, Sec. 2, 44 Stat. 1424; 33 U. S. C. A. Sec. 902, par. 12), which provides a definition when used in the chapter, *i.e.*:

"(12) 'Compensation' means the money allowance payable to an employee or his dependents, as provided for in this chapter, and includes funeral benefits provided therein."

The only jurisdiction the Deputy Commissioner has to award *compensation* for a death, therefore, is "to an employee or to his dependents, *as provided for in this chapter,*" and an "employee," as already stated, does not include "a member of a crew of any vessel."

These clear definitions of the jurisdiction of the Deputy Commissioner to make an award, leave little room for discussion. The respondent, however, made an award under undisputed facts showing that John Schumann was a member of the crew of the Steamer "Koal Kraft," and did so upon the grounds now urged by the United States Circuit Court of Appeals, that Schumann, having performed services such as, it was said, would be performed on the land by a laborer, was not a member of the crew, within the statutory exception, regardless of his relationship to the vessel.

(a) Schumann was a "member of the crew" because he was one of the ship's company.

The Act excludes from its application any "member of a crew of any vessel."

The test of exclusion from the Act therefore rests, as to one asserted to be of the crew, in the fact whether or not he has membership in it. It is his status as a member and not the work to which he is assigned as a member of the crew which determines exclusion. The crew, of which the membership is excluded from the Act, is that of the crew "of any vessel." This contemplates a ship engaged in the business for which it was created whether its voyage is long or short. Whether the crew is employed verbally or by written ship's articles, is a matter of no moment. The exclusion is complete if the working place is a vessel and the person employed on such vessel is incorporated into the ship's company operating it.

A most exhaustive case dealing with the question, "Who is a member of the crew?" is a decision by Mr. Justice Story when he was a circuit judge, reported as *United States* v. *Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740. The

matter arose in a criminal prosecution of the master of a ship who was found guilty of aggravated imprisonment of the ship's chief officer. Under a statute providing that—

> "If any master * * * shall, from malice, * * * imprison any one or more of the crew of such ship or vessel," etc.,

he should be punishable under the criminal law of the United States.

It was asserted that the chief officer who worked under the master of the ship was not one of the crew and, therefore, there was no violation of the statute.

The learned justice said that although criminal statutes must be strictly construed in favor of the person accused, nevertheless, the chief officer must be held to be one of the crew, and says, after quoting Johnson's Dictionary, to the effect that the crew is "a company of people associated for any purpose;" that the meaning was the same as applied to a ship's crew, and the Court used the following language:

> "And the same learned lexicographer adds, that, when spoken with reference to a ship, the crew of a ship, or ship's crew, means 'the company of a ship,' illustrating it by a verse from Dryden's translation of the Aeneid:
>
> "'The anchor dropped, his crew the vessel moor.'"

The language of the court in its conclusion is:

> "The words, master, and crew, in such a connection, naturally embrace all persons on board constituting the ship's company; and our statutes (as we have seen) so interpret them."

In the case of

The Bound Brook, (D. C.) 146 F. 160

the libel by several sailors was for wages. There was an issue as to their being members of the crew as they asserted the invalidity of shipping articles. There was for consideration a treaty between the United States and Germany, providing that differences between the master and the crew of the vessel should be adjusted by the consul. It was asserted that the libel ought to be dismissed and the matter remitted to the German Consul. The court, sustaining this contention, said (p. 164):

> "When the 'crew of a vessel' is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board. 'It matters not whether the contract is verbal or in writing or for a long or short voyage or period.' *The Marie*, (D. C.) 49 Fed. 286, 287."

In the case of

The Marie, (D. C.) 49 F. 286

the action was for wages, and a treaty between the United States and the Kingdom of Norway and Sweden was involved, providing that all differences "between the captains and crews of vessels belonging to the kingdom" shall be settled by the consuls thereof. Libelant in that case was a *cook*, and it was contended that he was not a member of the crew within the language of the treaty.

The court held that the provisions of the treaty barred the suit and that a cook was a member of the crew, and the court said (p. 287):

> "The words 'crews of the vessels' as here used, include all of the ship's company—all the seaman and

officers, except the captain. Rap. & L. Dict. *verb.* 'crew;' *U. S.* v. *Winn,* 3 Sumn. 209.

"The crew of a vessel,—the ship's company,—in a general sense comprises all persons who, in pursuance of some contract or arrangement with the owner or master, are on board the same, aiding in the navigation thereof. It matters not whether the contract is verbal or in writing, or for a long or short voyage or period."

In the case of

The Buena Ventura, (D. C.) 243 F. 797

the court had before it a case involving injury to a "wireless operator." He was paid a monthly stipend of $100 by the Marconi Wireless Telegraph Company and had a nominal pay of 25 cents per month from the vessel (which was, never in fact, paid him). The libelant becoming ill, the question at issue was whether he was entitled to maintenance and cure at the cost of the vessel as a member of the crew.

The court, after citing with approval the case of *U. S.* v. *Winn,* 3 Sumn. 209, and *The Bound Brook,* 146 F. 164, said (p. 799):

"The word 'seaman' undoubtedly once meant a person who could 'hand, reef and steer,' a mariner in the true sense of the word. But as the necessities of ships increased, so the word 'seaman' enlarged its meaning. Even in *Bean* v. *Stupart,* 1 Doug. 11, it was held that a warranty to carry '30 seamen besides passengers' meant that the 30 seamen included a cook, a surgeon, and other employes, and did not mean merely able seamen. And a cook was explicitly held to be a seaman in this court by Betts, J. in *Allen* v. *Hallet, Abb. Adm.* 573, Fed. Cas. No. 223. By the

same course of reasoning an employe on a barge may be regarded as a seaman. *The Walsh Bros.*, (D. C.) 36 Fed. 607. Also, a cooper. *United States* v. *Thompson*, 1 Sumn. 168, Fed. Cas. 16,492. See, also, *The Mary Elizabeth*, (C. C.) 24 Fed. 397. This court has even decided that a bartender may rank as a seaman in *The J. S. Warden*, (D. C.) 175 Fed. 314.

"But the reason of the matter is shown best by Judge Benedict's decision in *The North America*, 5 Ben. 486, Fed. Cas. No. 10,314, wherein he held that a fireman was a seaman."

In the case of

In Re Meyer, (D. C.) 74 F. 881.

the proceeding was one to limit liability of a vessel, and it was asserted that she was not seaworthy, in that she did not have a full crew as required by law. By the inspector's certificate she was required to have a master, two mates, two engineers and "12 crew" (making 17 in all). The defendants (p. 892) contended that the word "crew" meant only sailors who could navigate the ship, and that as a crew of 12 was required in addition to those specifically mentioned, this number could not be made up by including a fireman as part of the 12.

The court held—

"* * * that the word 'crew,' as used in the certificate, should not be construed to mean sailors only,"

and that a *fireman* was a member of the crew.

See also

Jones v. *Shepherd Deputy Comm.*, 20 Fed. Suppl. 345 (deckhand).

) **A "member of the crew" is not an "employee" under the Therefore the Deputy Commissioner was without jurisdic- to make an award.**

he jurisdiction of the Deputy Commissioner admin- ring the Longshoremen's and Harbor Workers' Com- sation Act is limited to awards on behalf of em- ees of defined and limited class. The class over which o exercises jurisdiction are employees engaged in work n the navigable waters of the United States other than ters of ships and members of the crew of vessels.

44 Stat. 1424 Sec's 2-3-19, 33 U. S. C. A. chap 18, Sec's 902, 903, 919.

he scope of powers of the Deputy Commissioner are scribed in Sec. 2 of the Act as follows:

"The term 'deputy commissioner' means the dep- uty commissioner *having jurisdiction* in respect of an injury or death." 44 Stat. 1424, 33 U. S. C. A. Sec. 902, par. 7. (Italics ours.)

he powers of the Deputy Commissioner are declared er Sec. 19 of the Act, 44 Stat. 1435 as amended, 52 . 1167, 33 U. S. C. A. chap. 18, sec. 919, which pre- bes that:

"* * * the deputy commissioner shall have full power and authority to hear and determine all questions in respect of *such claim.*" (Italics ours.)

Such claim" in the instant case is the claim for "death n employee."

44 Stat. 1426, 33 U. S. C. A. chap. 18, Sec. 903.

he "employee" respecting whose death the commis- er has jurisdiction to award upon "such claim" is ned in Sec. 2 of the Act:

"The term 'employee' does not include a master or member of a crew of any vessel." (44 Stat. 1424, 33 U. S. C. A., Ch. 18, Sec. 902.)

Interpolating into Sec. 3 of the statutes prescribing coverage, after the word "employee," the definition in Sec. 2, the pertinent part of Sec. 3 (with the definition interpolated by us in parentheses) reads:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee (the term 'employee' does not include a master or member of a crew of any vessel)."

The statute has been construed, as we here contend, by this court in the case of

Crowell v. *Benson*, 285 U. S. 22.

That case affirmed a decree in favor of a complainant in a suit to enjoin enforcement of an award under Longshoremen's and Harbor Workers' Compensation Act. In that case, this court said, respecting the finality and jurisdiction of the Deputy Commissioner:

> "The finality of such determinations of the Deputy Commissioner is predicated primarily upon the provision (§ 19 (a)) that he 'shall have full power and authority to hear and determine all questions in respect of such claim.' But, 'such claim' is the claim for compensation under the Act and by its explicit provisions is that of an *'employee,' as defined in the Act*, against his 'employer.'" (P. 62.) (Italics ours.)

In distinguishing true questions of coverage of the Act, which is the issue involved in the case at bar, from cases where an employee covered by the Act is debarred of his

m because of intoxication, suicide, etc., this court, in case cited, makes the express distinction:

"Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence, and within the scope of his authority, shall be final." (P. 46.)

urther pursuing that subject, the court says:

"And this finality may also be regarded as extending to the determination of the question of fact whether the 'injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.' While the exclusion of compensation in such cases is found in what are called 'coverage' provisions of the Act (§ 3), the question of fact still belongs to the contemplated routine of administration, for the case is one of employment within the scope of the Act and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation." (P. 47.)

istinguished from cases of intoxication, etc., however, situations such as that in the case at bar, where the eased was a member of the crew and therefore expressly luded from the jurisdiction of the commissioner, and such cases the court says, in the case cited:

"What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the

determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme." (P. 54.)

When the court in the foregoing citation uses the word "jurisdictional" as related to administrative agency, it means a determination whether or not it falls within the scope of the authority conferred on the administrative agency. As was said in

Interstate Commerce Commission v. *Humboldt Steamship Company*, 224 U. S. 474, 484,

"It is true, there may be a jurisdiction to determine the basis of jurisdiction (*Ex Parte Harding*, 219 U. S. 263, 55 L. ed. 252, 31 S. C. Rep. 324), but the full doctrine of that case cannot be extended to administrative officers."

The true view of the matter, from a legal viewpoint, is that if an employee is of a class embraced within the benefits of the Longshoremen's and Harbor Workers' Compensation Act, as in case of a longshoreman who is not asserted to be a member of a crew of a vessel, then although both the employer and employee are subject to the Act, the employee may nevertheless be barred of his recovery. This bar of his recovery may be because the injury occurred solely by intoxication of the employee or the willful intention of the employee to injure or kill himself or another (§ 3b).

As this court has noted and explained, both the employer and the employee are, in such case, within the scope of the Act and the commissioner administering it has jurisdiction over the question of compensation; but despite this power of the commissioner to make an award, he may never-

heless refuse an award as part of his administrative owers and duties because the employee has committed an ct which estopped him from its benefit. It is in the nature f a *condition subsequent* to application of the Act which espite application of the Act bars damages.

The inquiry and determination on uncontradicted facts hether or not the person in the general employ of another an "employee" within the Act (because of the fact that e is a master of a vessel or a member of the crew of a essel), and whether or not power exists in the commis- oner to take hold of such controversy, presents a *condi- on precedent* to the attachment of jurisdiction. The de- rmination of that question is one which goes to the very xistence of any power in the commissioner. A court, to hich such question is presented according to law, has the uthority and the power to determine such question for self, independently, under the law and the evidence, in- ependent of the findings of the administrative body.

The power of the court independently, under the law and he evidence, to come to its own conclusions as to juris- iction of the administrative body has prime importance pon the issue whether the trial should be *de novo* or upon he record made before the administrative body.

Even if it were to be assumed that the administrative ody had the initial power to determine its own powers nd jurisdiction, there would still be the power in the ourt to review the matter upon the evidence and the rec- rd made before the Deputy Commissioner, and such power expressly reserved to the courts by Sec. 21 of the Act, Mar. 4, 1927, c. 509, Sec. 21, 44 Stat. 1436, 33 U. S. C. A. hap. 18, sec. 921, which provides, paragraph (b):

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part,

through injunction proceedings brought by any party in interest against the deputy commissioner making the order and instituted in the Federal Court."

If, therefore, under the evidence as heard before the Deputy Commissioner, it is proven that Schumann was a member of a crew of the vessel, then an award of compensation is "not in accordance with law," and may be set aside through these injunction proceedings.

Complete power exists to set aside the finding of the Deputy Commissioner because it was without evidence and contrary to the indisputable character of it.

Crowell v. *Benson*, 285 U. S. 22, 49-50.

Such power to enjoin the order exists where it appears that the deputy has "acted in a case to which the statute is inapplicable."

Crowell v. *Benson*, 285 U. S 22, 63.

The statute uses the term "member of a crew of any vessel." Schuman was a *seaman*, the term *being defined by the shipping statutes* of the United States, 38 Stat. 1168, Ch. 153, §10; R. S. 4612; 46 U. S. C. A. § 713, as follows:

"In the construction of this chapter * * * every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same (any vessel belonging to any citizen of the United States) shall be deemed and taken to be a seaman."

NOTE—"Apprentices" are persons under 18 years of age as defined R. S. § 4509, 46 U. S. C. A. § 561.

Applying that standard this court has held that any person employed in any capacity on a vessel is a "seaman" and not a "laborer."

It was so held in

Ellis v. *United States*, 206 U. S. 246,

involving a claimed violation of a statute forbidding laborers from working more than 8 hours per day on public works where it was said that "whatever the nature of their work it is incident to their employment on the dredges and scows * * *" and therefore they were "not laborers or mechanics." (P. 260.)

The case involved proceedings against Eastern Dredge Company for working dredges more than eight hours, "employing two deck hands and an assistant craneman and deck hand upon a dredge" (p. 258). The question was "whether such dredge employees, including such deck hands, were laborers or mechanics" within the meaning of the Act (p. 258).

This court held that the deck hands and others employed on the dredges were not "laborers within the intent of such statute, but more properly classed as seamen."

In the case of *Maryland Casualty Co., et al.* v. *Lawson, Deputy Commissioner, et al.*, 94 Fed. (2d) 190, (C. C. A. 5th Cir.—Jan. 20, 1938), the suit was to set aside an award of compensation by the Deputy Commissioner, purporting to act under the Longshoremen's and Harbor Workers' Compensation Act, and to set aside his award for the death of one Burrows. The Court says (p. 192):

> "A single question, common to both appeals, needs decision; to wit, Was Burrows an employee within the act, so that the Deputy Commissioner had jurisdiction? This is a question on which his fact findings are not conclusive. *Crowell* v. *Benson*, 285 U. S. 22, 24."

Burrows was drowned while unloading a scow about three miles off the harbor at Miami.

The court says (p. 192):

"We attempt no definition of the crew of a vessel. Who are included was discussed recently, from different standpoints, in *De Wald v. B. & O. R. Co.*, 4 Cir., 71 F. 2d 810 and *Wandtke v. Anderson*, 9 Cir., 74 F. 2d 381. There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise and to protect her in emergency, and a right to look to her and her earnings for wages. If she has a master, there is subjection to his commands. The nature of the work done is not determinative. Engineers and cooks as well as sailors are included. Longshoremen who load and unload a vessel under temporary local employment do not become members of the crew, nor do mechanics who similarly come aboard her to repair or clean or paint her; nor do those permanently employed upon her cease to be members of the crew because they are put at the same sort of work."

The court says the evidence is without contradiction that the dredge Corozal

"• • • was in command of a licensed master and was clearly a vessel with a crew within the meaning of the act, under our holding in *Kibadeaux v. Standard Dredging Co.*, 5 Cir., 81 F. 2d 670; *Standard Dredging Co.* v. *Kibadeaux*, 299 U. S. 549." (P. 192.)

Burrows worked on the scow. He was hired by the master of the dredge, on which he was fed and quartered. He signed no seaman's articles, and was not shown to be an experienced sailor.

"• • • But he and another were put aboard this scow and remained there during their daily shifts

of eight hours handling her lines, doing what was necessary to her navigation, and attending to dumping and cleaning her at sea.

While alongside the dredge and while aboard the dredge, they took orders from the master of the dredge. * * * He was employed under the title 'deckhand,' and the evidence is that men at his work were always so called." (P. 193.)

The court holds that:

"* * * The Deputy Commissioner was without jurisdiction. The judgments are reversed and the causes remanded, with direction to set aside his award." (P. 193.)

We call attention to the sister case of *Lawson, Deputy ommissioner, et al.* v. *Maryland Casualty Co.*, 94 F. (2d) 93 (C. C. A. 5th Cir.—January 20, 1938), by the same ourt, where a workman who performed his duties on a owboat which was used to place dynamite and explode , was held to be under the Longshoremen's Act and not member of the crew of any vessel. The court, in that ase, stressed the fact that his work was not assigned and irected by the master, but by a land foreman; that his ork was directed not as part of the dredge activity as irected by the master, but by the superintendent of the redging company, who was the master's superior and who ould take the skiff where he desired.

The conclusion of the court's opinion was that:

"He was bound to no vessel as a crew member, and entitled to a lien on none for his wages." (P. 194.)

We respectfully submit that the two foregoing cases ndicate the line of division. It cannot be questioned that

if Schumann had not been paid his wages he would have had a lien on the Koal Kraft to recover them, and could have proceeded *in rem*.

All his duties were performed on the Koal Kraft, and none on shore (R. 21).

He was under the exclusive direction of the master, who paid him (R. 17).

He was one of the number of persons required by the certificate as a member of the crew (R. 65), and if he left the vessel and were not replaced by another, the vessel could not operate lawfully at all (R. 42).

The case of *Maryland Casualty Co. et al.* v. *Lawson*, 94 Fed. (2nd) 190, above cited, was called to the attention of the Circuit Court of Appeals in the case at bar in our brief and again on rehearing (R. 99, 100) but for some reason that learned court neither cited or discussed the decision which we regarded as of controlling importance.

In the case of *Kibadeaux* v. *Standard Dredging Co.*, 81 Fed. (2d) 670 (certiorari denied by Supreme Court of United States, *Standard Dredging Co.* v. *Kibadeaux*, 299 U. S. 549,) the opinion is by the Circuit Court of Appeals, Fifth Circuit—Feb. 3, 1936. The facts in that case (see p. 673), comparatively with the facts of the case at bar, are as follows:

The steam dredge Burlington was a vessel of 351 tons gross. (In the case at bar the Koal Kraft was 376 tons gross (R. 65).)

The dredge in the case cited had a master, engineers, oilers, firemen, levermen, mates, deck hands, cooks and helpers, timekeeper and a civil engineer.

The dredge in the case cited had no motive power of her own (P. 673.) (The Koal Kraft was a vessel proceeding under her own steam power (R. 14, 65).)

In the case cited the men were paid bimonthly wages and fed on the dredge, working eight hour shifts, but at their option could go ashore after their working hours to spend the night (p. 673). (Schumann was paid bimonthly, fed himself, and slept ashore (R. 49).)

In the case cited Kibadeaux was "employed as a deck hand, with duties as a general helper" (p. 673). (Schumann's duties were similar (R. 50, 51).)

The court held Kibadeaux was a seaman, and stresses the fact that he was the type of a person who would have a maritime lien for his wages (p. 674). (The same is true as of Schumann.)

The court (quoting from *Ellis* v. *United States*, 206 U. S. 246) says that all dredge hands are seamen within the definition of an earlier statute of the United States, because they are "called upon for more or less of the services required of ordinary seamen" (p. 674). The fact that the work is all performed on board ship is of importance, and the court says:

> "Whatever the nature of their work, it is incident to their employment on the dredges and scows, as in the case of an engineer or coal shoveler on board ship." (P. 674.)

A libel to recover damages independent of the Longshoremen's Act was sustained, on the ground that the Longshoremen's Act did not apply.

The foregoing decision raises a highly pertinent question. If Schumann had been injured instead of being

killed, and had brought a libel in admiralty against the Koal Kraft for injuries, the question would necessarily arise in such case whether he was entitled to maintain his action or whether he was remitted to his action under the Longshoremen's Act. This question was decided by the Circuit Court of Appeals in the *Kibadeaux* case as a judicial question requiring the court to determine whether or not the facts brought the case within the jurisdiction of the court or within the jurisdiction of the Deputy Commissioner administering the Longshoremen's Act, because the jurisdiction of one would be exclusive of the jurisdiction of the other.

The evidence was repeated and uncontradicted, that the deceased, John Schumann, was a "deck hand" or otherwise described as an ordinary seaman (Dep. Comm. R. 15, 16, 20, 35; Dist. Ct. R. 49, 51, 52), as distinguished from an able seaman (Dist. Ct. R. 66). The ordinary seaman or deck hand does the manual labor on a ship, such as scrubbing decks, painting, and handling the lines of the ship and any other incidental work to be done primarily by brawn. The fact that he is not a skilled mariner, able to reef a sail or handle a tiller, is of no importance. Commonly deck hands are employed on steam vessels, which are propelled by steam and not by sail. Lexicographers all agree on the definition of a deck hand, and this is illustrated in Webster's New International Dictionary, Second Edition, where the definition appears as follows:

> "Deck hand. A common sailor, esp. one employed on steamers or coasting vessels."

A common laborer on shore working on a farm (farm hand) or on a dock (longshoreman) or elsewhere than on a ship may be a "hand," but not a *deck*-hand. The nautical conception of a "hand" is commonly and universally

recognized, and in Webster's International Dictionary, Second Edition, under the title "hand," the definition (numbered 27) reads:

"Naut. A member of a crew."

To say that a deck hand is an ordinary laborer and not a member of a crew of a vessel, although he performs all the services of an ordinary seaman, is violative of common and nautical understanding and contrary to the decisions of the courts.

(c) Deceased was a "member of the crew," a deckhand, notwithstanding the fact that he did not sign "shipping articles."

Respondent contended in the Circuit Court of Appeals, and that court apparently gave weight to the fact, that the deceased, John Schumann, did not sign shipping articles and therefore respondent asserted he was not a member of the crew.

Membership in the crew does not rest upon the fact of signing or not signing of shipping articles (even when required by law), but for failure to conform to such requirements of statute, the master and the ship may become liable to penalties for violation.

There is no substance to the claim that shipping articles were required to ship a crew on the Koal Kraft, which operated only in Calumet River and Indiana Harbor and never operated at any time except in the navigable waters within the State of Illinois or occasionally to ports in Indiana, which is an adjoining state.

The statute governing this matter is Rev. Stat. 4520, 46 U. S. C. A. ch. 18, § 574. (This section is set out in full in Appendix p. 63). The act was derived from the Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131; Act of June

7, 1872, ch. 322, § 12, 17 Stat. 264. The portion of this section having bearing on this case is as follows:

> "Every master of any vessel of the burden of 50 tons or upwards, bound from a port in one state to a port in any other than an adjoining state * * * shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman on board such vessel," etc.

(The statute requiring shipping articles upon merchant vessels bound to foreign ports is Rev. Stat. § 4511, 46 U. S. C. A. ch. 18, § 564.) Appendix p. 63.

The statutory provisions requiring shipping articles under specified conditions have been held inapplicable to tugs towing vessels from one lake to another (*The John Martin*, 13 Fed. Cas. No. 7357) and have been held inapplicable to fishing or whaling voyages not from port to port. The theory behind the statutes is entirely reasonable. The purpose of shipping articles in writing is to declare the voyage and the term of time for which seamen are shipped, and the rate of wages, and when the seamen are to render themselves on board; and are applied only to seamen upon voyages to foreign ports and to ports of another state other than an adjoining state.

> 3 Kent's Commentaries 177; also Note (b), same page.

One of the chief purposes of such shipping articles is to declare the voyage, so that the seamen may not be impressed pursuant to a deviation, by being taken to a different port than that in contemplation and having the length and term of his voyage entirely variant from his intentions, and to prevent the breaking up of a voyage at a far point of the world by the abandonment of the

ship by the sailor or the ejection of him from the ship by the master. These considerations obviously have no application where the vessel operates in a local port or between ports in immediately adjoining states. Whaling voyages, where no port is in contemplation and fishing trips to the Grand Banks also require no shipping articles, because the provision as to shipping articles contemplates only voyages to foreign ports or ports of other states not adjoining.

> "In this view, neither fishing nor whaling voyages are strictly foreign voyages. This is the sense in which foreign voyages are understood in the Duties Collection Act of 1799, c. 128, and in the act of 1790, c. 56, and of 1813, c. 2, relative to shipping articles."
>
> 3 Kent's Commentaries, 177.

Although whaling voyages are not within the terms of the statute, by custom in the whaling industry private contracts (not statutory shipping articles) were commonly employed by custom.

3 Kent's Commentaries, 177, Note (b).

See

Burdett v. *Williams*, 27 F. 113, 117.

In the case of *Thorson* v. *Peterson*, 9 Fed. Rep. 517, before Blodgett, D. J., in District Court, the status of a seaman, not signed under shipping articles, on a voyage between Illinois and Michigan was considered as follows:

> "But this statute is only applicable to voyages from a port in one state to a port 'in any other than an adjoining state,' and as this court is bound to take notice of the legally established boundaries of the different states, it must be held that Illinois and Michigan are 'adjoining states' within the meaning of this statute."

A libel based upon the claim that there was a violation of law in not having signed shipping articles was held not sustainable on this ground, as shipping articles were held not required by law (p. 519).

In the case at bar, the vessel proceeded from a dock on the Calumet River in the State of Illinois to another vessel at anchor in the same stream, also in the State of Illinois (Dist. Ct. R. 48, 50).

The requirements for written shipping articles being of statutory creation, such written articles are not required in the cases not covered by the statute.

> "Libelants contend that in the case at bar, even in the absence of statute a written agreement with seamen before proceeding on a voyage to Mexico is required by the general maritime law. In view of the legislative history of Acts requiring such written agreement, this contention is untenable."
>
> *The Lilly*, 69 F. (2d) 898 (C. C. A. 9th Cir.).

See also review of the history of these statutes in

> *U. S.* v. *The Brig Grace Lothrop*, 95 U. S. 527, 532.
>
> *The John Martin*, Case No. 7357, 13 Fed. Cas. 694, 2 Abb. U. S. 172 (1870).

This latter case was a libel *in rem* in admiralty for wages brought by the engineer of a tug where the defense was that the libelant had deserted and could not recover. The court found that the contract of hiring was an oral one, on a month to month basis.

In discussing shipping articles, and requirement of their execution, the court said:

> "In cases in which such contract is required, and the nature of the contract, are prescribed in the first

sentences of the act, in the following words: 'Every master or commander of any ship or vessel bound from a port of the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upward, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel, * * * declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped.'

Now in this case, the vessel is a tug, engaged in towing vessels between Lakes Erie and Huron, through the Detroit and St. Clair rivers, and over the St. Clair flats. She was from the port of Detroit, in the state of Michigan, but was not bound to 'any foreign port,' and although a vessel of upwards of fifty tons burden, she was not bound to a 'port in any other than an adjoining state.' She, in fact, was not bound to any port whatever. Her destination and employment was almost exclusively out upon the open water. It is true, in the prosecution of her occupation, she might and might not run into Canadian waters, or stop at points on the Canadian shore for wood or other supplies, as it is shown that she did at Malden, on September 23, on her way back from Lake Erie to Detroit, but clearly this does not bring her within the description of vessels to which the statute is intended to apply. It is said that she also frequently ran into waters and sometimes took her tows into ports in the state of Ohio; but Ohio is an adjoining state, and therefore not within the statute.

The statute was intended to apply to vessels engaged in foreign commerce, and inter-state commerce,

other than between adjoining states, and of course not to a case of this kind. See *Milligan* v. *The B. F. Bruce* [Case No. 9,602]. The act of 1856 (11 Stat. 62, § 25) must be construed together with the act of 1790, *in paria materia*, and as constituting part and parcel of the same general system, and therefore the remarks above made in relation to the act of 1870 will apply with equal force to that of 1856."

(d) The character of the steamer Koal Kraft.

The Koal Kraft was a licensed vessel of the United States (R. 61). She had an inspection certificate issued by Vessel Inspectors (R. 65, 48). She was a vessel subject to inspection and certificate governing crew.

48 Stat. 125, Ch. 61, § 4399, 46 U. S. C. A., § 361.

She was required to be inspected by Government Inspectors annually, and certificate to be issued by inspectors, without existence of which she would not be permitted to enter into navigation.

33 Stat. 1023, Ch. 1454, § 4417, 46 U. S. C. A. § 391 (Hull Inspection);

48 Stat. 125, Ch. 61, § 4418, 46 U. S. C. A. § 392 (Boiler Inspection).

There are provisions for certificate to be issued by the inspectors.

38 Stat. 1216, Ch. 184, § 4421, 46 U. S. C. A. § 399.

By statute, power is given steamboat inspectors to designate the complement of licensed officers and crew and to make such designations in their certificate. A

vessel may not be navigated unless she complies with these directions.

> R. S. § 4463; Apr. 2, 1908, c. 123, § 1, 35 Stat. 55; Mar. 3, 1913, c. 118, § 1, 37 Stat. 732; Mar. 4, 1915, c. 153, § 14, 38 Stat. 1182; May 11, 1918, c. 72, § 1, 40 Stat. 548; June 30, 1932, c. 314, § 501, 47 Stat. 415; 46 U. S. C. A. Ch. 11, Sec. 222.

The rules and regulations of the Board of Supervising Inspectors for the Great Lakes have the force and effect of an act of Congress.

> *Leathem, Smith-Putnam Navigation Co., et al.*, v. *National Union Fire Ins. Co., et al.*, 96 Fed. (2d) 923, 927.

The certificate of the Koal Kraft required "1 licensed master and pilot, 1 licensed chief engineer, * * * 1 fireman" and in addition, "3 seamen" (R. 65).

Schumann was one of such 3 seamen. If he, or some one in his place were not on board, the vessel could not operate in the absence of such crew of 6 aboard (Dist. Ct. R. 54).

II.

The District Court had plenary power under the statute to investigate lawfulness of the award and did not err in trying such issue de novo.

Inferences of law drawn by the deputy commissioner from undisputed facts are not conclusive. The statute provides for a review in Federal Court of any award "if not in accordance with law" (Sec. 21(b)).

Such review is provided to be had by independent suit and not upon the narrow principles incident to certiorari at common law.

Whether the trial should be *de novo* or upon the record made before the deputy commissioner is a procedural question which should not be controlling because the evidence was virtually identical on both hearings.

Petitioners asserted in their bill for injunction that an injunction ought to issue because the plaintiffs and the deceased, Schumann, are not persons comprehended within the terms of the Longshoremen's and Harbor Workers' Compensation Act (R. 5). Respondent, by his answer, contended to the contrary (R. 46).

On the production of evidence on the hearing of the case in court, no objection was made to the *de novo* hearing, but the production of evidence in court was without objection (R. 47, 54).

The evidence so produced in open court was in substance the same as that produced before the Deputy Commissioner and it was so asserted at conclusion of the trial by counsel for respondent (R. 59).

Opposing counsel stated that the only thing new was the certificate (Certificate of Inspection, Plaintiffs' Ex. 1, R. 65, offered at R. 48). The terms of such certificate were informally proven before the Deputy Commissioner and its formal production then dispensed with, because it was posted in the pilot house of the ship (R. 41, 42).

With the exception of production of this certificate itself, it was conceded by opposing counsel, and it is a fact, that there was nothing substantially new outside of the record produced before the Deputy Commissioner (R. 59), and all of the proceedings before the Commissioner were introduced in evidence before the court by agreement (R. 61). Both the District Court and the Circuit Court of Appeals concluded that it was a matter of no special importance

whether the case was heard upon the record before the Deputy Commissioner or upon the evidence heard in open court, and the Circuit Court of Appeals held that whether considered upon the record before the Deputy Commissioner or upon the hearing before the court, as the facts were not in dispute, the conclusion to be drawn by the court would be the same from either record (R. 91-92).

The Circuit Court of Appeals for the Sixth Circuit under similar circumstances held that assigning error and the granting of a trial *de novo* was immaterial where the same conclusions would be drawn from each record and, therefore, it was not necessary to pass upon such procedural question.

Taylor v. *McManigal, Dep. Com'r. and Ellice Watkins*, 80 F. (2d) 583.

Even if considered upon the record made before the Deputy Commissioner, the court has the power to draw appropriate legal inferences as to jurisdiction or want of it from the record, and if that shows a want of jurisdiction, namely, that the claimant is a member of the crew, an injunction may issue.

Jones v. *Shepard, Dep. Com'r., et al.*, (D. C.) 20 Fed. Supp. 345.

All the foregoing considerations aside, it has been determined by this court that trial *de novo* is appropriate, and as the case has already been cited to the court in other portions of this brief at some length, we shall not note it with particularity here, except to again cite it to the court.

Crowell, Dep. Com'r. v. *Benson*, 285 U. S. 22.
(See, particularly, discussion at pages 48, 49-50, 62, 63.)

We believe that any question as to trial *de novo* is further foreclosed by the fact that the case was tried upon the theory of a trial *de novo* in the District Court, and an inconsistent position may not be asserted on appeal by the person who made no objection to so hearing it in the trial court.

3 Corp. Jur. 718, Sec. 618.

4 Corp. Jur. Sec. 465, Sec. 241 (a).

III.

The District Court having made Findings of Fact and Conclusions of Law which were not assailed on appeal, the Circuit Court of Appeals was bound in law to affirm the judgment of the District Court.

The court held three Conclusions of Law (R. 69) and made nine Findings of Fact (R. 70-71), all of which we have set forth in our Statement of Facts (*Ante* pp. 10-13).

The only error specifically asserted by respondent against the Findings of Fact and Conclusions of Law was directed to the finding of the District Court that—

> "John Schumann was a member of the crew of the vessel on which he was working" (R. 74)."

This assignment is directed to Finding of Fact No. 7 (R. 71), and the Court of Appeals so treated it and did not advert to any other finding, unless by inference to a portion of Finding of Fact No. 5 (R. 70), wherein the District Court found that at the time of his death the deceased "was a seaman."

We call attention to unchallenged Findings of Fact and Conclusions of Law which, upon this record, we think stand uncontroverted, not only because they are uncontradictedly

proven by the evidence, but because they were not challenged or assailed by respondent in the points asserted in the Circuit Court of Appeals.

(Numbers herein refer to numbered Findings of Fact, R. 70-71.)

On October 31, 1937, the deceased, Schumann, came to his death by drowning in the Calumet River while employed on the vessel Koal Kraft (1).

The drowning occurred while the Koal Kraft was navigating the Calumet Harbor and River, navigable waters of the United States (3).

Schumann was employed as a deck hand on the vessel Koal Kraft and, as such, his duties consisted in making lines fast, loosing them, keeping the vessel clean, and various duties incident to fueling vessels, in which trade the said vessel was at that time engaged (3).

During employment of the deceased by South Chicago Coal & Dock Company he performed the duties of a deck hand aboard the vessel Koal Kraft which, at the time he lost his life, was being navigated in the Calumet River between plaintiff's dock at 95th Street and the vessel Ashley at 104th Street and Calumet River, both the dock and such vessel to be fueled being in Cook County, Illinois (4).

At the time, the vessel was being operated not to exceed twelve hours of the day. The members of the crew on the voyage during which Schumann was lost overboard were the master, engineer, fireman, and three deck hands, one of whom was John Schumann (6).

The Koal Kraft was, at the time, a vessel of the United States, engaged in harbor navigation, with a crew and ship's papers (9).

The Conclusions of Law (R. 69), as herein next recited, were unassailed on appeal by the respondent and their propriety stands conceded on the record (numbers refer to numbers of three respective Conclusions of Law held by the court, R. 69).

The court found the crew-membership required under the law, and that the Koal Kraft when operating not to exceed twelve hours was permitted so to do "with a crew of one licensed master and pilot, one licensed chief engineer, three seamen and one fireman" (R. 69) (1).

> "Under the law, a member of the crew of a vessel is not, nor is the owner of such vessel, subject to the jurisdiction of the Commissioner or Deputy Commissioner * * * justifying any award of compensation for the death of a deck hand, a member of the crew" (3).

In reviewing the Findings of Fact and Conclusions of Law which we assert are unchallenged and stand admitted, we have intentionally omitted Findings of Fact and Conclusions of Law which might be held to be challenged by the points upon which respondent relied on his appeal to the Circuit Court of Appeals (R. 73-74).

We specially call attention to the fact that the District Court's findings that the legal conclusion, that the employee relation as a member of the crew was essential as a jurisdictional requirement to warrant the Deputy Commissioner in taking jurisdiction to make any award, was not assailed in any way.

As it stands admitted, as we contend, that the deceased was a deck hand, employed as such, with duties of making lines fast, loosing them, keeping the vessel clean, and various duties incident to fueling vessels, the question

whether he was a seaman or a member of the crew is one which can be answered in only one way under the foregoing unchallenged Finding and Conclusions.

We think the Circuit Court of Appeals intended by its opinion that all these facts as found by the District Court should be taken as conceded, because that court says:

> "In either case the facts are not in dispute. Therefore on undisputed evidence, is the finding, which we might call a conclusion that the deceased was a seaman, consistent with the undisputed facts?
>
> "Convinced as we are that the evidence establishes a non-seaman status it follows that the court erred in holding to the contrary." (R. 91-92.)

The Circuit Court of Appeals said in its opinion:

> "* * * that the inquiry into the crew-membership status is not jurisdictional in character, and, therefore, is one for the commissioner to determine, and his determination if supported by the evidence may not be disturbed by the District Court." (R. 88.)

The District Court held under Conclusion of Law No. 3 (R. 69) that, under the law, no jurisdiction existed in the Deputy Commissioner, and that a member of a crew of a vessel is not subject to the jurisdiction of the Deputy Commissioner under the Act in question (R. 69). This finding of law, as to the extent and limits of the jurisdiction of a Deputy Commissioner, is not challenged in the points asserted by respondent on the appeal to the Circuit Court of Appeals (R. 74).

If the question whether a person is a master or is a member of the crew, is subject to final determination of the Commissioner on undisputed evidence; and if he may

draw inferences which the District Court is bound to follow and not independently to examine, then it is fair to state that there can in no case be any independent examination under the law and the evidence, by any court, of any question of jurisdiction of the Deputy Commissioner. As we read the case of *Crowell* v. *Benson*, 285 U. S. 22, this court has held against such conclusion of the Circuit Court of Appeals.

IV.

Analysis of the Opinion of the Circuit Court of Appeals (104 Fed. 2nd. 522).

We have already called attention to parts of the opinion of the Circuit Court of Appeals (R. 84) especially as to the jurisdictional nature of crew-membership (See this brief ante Points I-III). The Circuit Court of Appeals in its opinion (R. 88) says that:

> "* * * the inquiry into the crew-membership status is not jurisdictional in character."

We regard this position of the Circuit Court of Appeals as unsound under the determination of that identical issue by this Court in *Crowell* v. *Benson*, 285 U. S. 22.

The Circuit Court of Appeals says, in effect, that an inquiry whether or not a deceased deck hand is a member of the crew is no more a question of jurisdiction of the Deputy Commissioner than is the issue of suicide (R. 88). The Longshoremen's Compensation Act provides that suicide shall bar a recovery, but that issue is clearly not jurisdictional because it is a question of allowing or not allowing a compensatory amount for death in a case over which the Deputy Commissioner concededly has jurisdiction to make an award. An award is barred, however, because of the wrongful act of the person who is within the terms of the Act

(on the principles which would be applied in the case of a release or assertion of an estoppel). The distinction between a defense of suicide of one concededly under the Act and a defense against a compensation claim that the person asserting the claim never was under the Act, presents two distinct propositions: the latter being jurisdictional, and the former not.

See

Crowell v. *Benson*, 285 U. S. 22, 47.

The Circuit Court of Appeals in its opinion compares the status of a deck hand on a vessel engaged in navigation with a case of a watchman of a vessel moored at a dock, not engaged in navigation and without a crew aboard.

We think the court has clearly fallen into error in citing cases of watchmen on a ship not in commission who are, of course, not seamen or members of a crew under the circumstances mentioned. (See opinion of the Circuit Court of Appeals Note at R. 90 and 91.)

The opinion undertakes to make an invalid and unsound distinction when it says (R. 91), that although the Certificate of Inspection by the Vessel Inspectors required a crew of five in addition to the master that, nevertheless, in the language of the Circuit Court of Appeals:

> "While we have given some weight to the fact that the Certificate of Inspection required a crew of five in addition to the master and that in this instance five would be present only if Schumann were included, we are convinced that the word 'crew' as used in the certificate has a different significance and connotation than the word 'crew' as used in the statutory exception" (R. 90-91).

This distinction, the Circuit Court of Appeals says, rests in the fact that the task performed by Schumann—

> "* * * might just as well have as its background a coal truck, a roundhouse or a mine as a steamship. It was an ordinary laborer's job and it was merely happenstance that the location of this position was on shipboard."

There is no doubt that if the lines were loosed from the dock by a dock laborer or loosed at the other end on board ship by a deck hand, that the character of the particular task would be the same. It cannot be questioned that one who paints a building and one who paints the deck of a ship in each case may similarly use paint and a brush and thus apply a coat of paint to the object on which he is working. If the position in the opinion were sound, a fireman on a vessel would never be a member of the crew because shoveling the coal under the boiler of a vessel does not involve essentially different character of labor from shoveling the coal under a boiler ashore. A radio operator on board a ship does not perform his duties in sending or receiving messages in any different way than a radio operator in a station ashore.

To follow this argument to its logical conclusion, no one could be a member of a crew except, perhaps, the master or chief engineer, because it would be possible to imagine similar work being performed on land and, therefore, it would be "merely happenstance that the location of this position was on shipboard." It is rare, however, that a fireman firing a boiler in a factory or a coal shoveler in a coal yard drown as Schumann did. The fireman in the factory and the coal shoveler in the boiler house ashore are also not wards of the court of admiralty. Neither could it be anticipated that they might be ordered

by their foreman to climb a mast, to help let go an anchor or to help splice a broken rope. The Circuit Court of Appeals is in error in minimizing the circumstance of location where the work is performed, because the very essence of membership in a crew is that such member of the crew is one of the ship's company. The fact that he works on a ship and not on the land makes him subject to the exclusive direction of the master of the ship and he is so identified with the ship that he can demand that, if ill, he may have his maintenance and cure; if his wages be not paid, he may have a lien on the ship, etc. Membership in a ship's company carries with it privileges and obligations of differing character than land work even if the muscular effort in performing routine duties are alike. Congress having, in the Act, made the distinction between members of a crew and all other persons, the court has no right to ignore or refuse cognizance of it or to assert that no difference exists. Unwittingly the Circuit Court of Appeals has taken the functions of Congress upon itself.

There is nothing in the Act remotely indicating that the words "member of a crew" have any peculiar or unusual meaning. The exclusion of members of a crew and a master from the "*benefits*" of the Longshoremen's and Harbor Workers' Compensation Act also excludes them from the *drawbacks* incident to being under the Act.

It may well be that a person suffering injury from the neglect and fault of the vessel and its owners would prefer to have his action for damages and not to have compensation under the Act. In truth, the history of this Act discloses that the masters and seamen urged Congress to except them from the Act because they did not want it.

CONCLUSION.

A farmhand is a workman doing ordinary work on a farm.

A factory hand performs assigned tasks in a manufactory.

A deck-hand is in a similar position on ship board.

A watchman on a ship out of commission is not one of a ship's company for the ship's company is disbanded. The ship is hibernating and its functions suspended. Therefore a watchman on shipboard is not one of the crew of a vessel.

A deckhand on a vessel operating upon navigable waters is as essential to existence of a complete ship as the anchor and the mooring line.

The test leading to the conclusion that a person is a "member of a crew of any vessel" involves a determination:

(a) That the place of performance of duties is upon navigable waters.

(b) That such duties be performed primarily on shipboard.

(c) That the workman owes a duty of obedience to the directions of the ship's officers (primarily the master) with a correlative duty of protection of him by the ship's officers.

(d) That the work have relation to the operation of the ship (as distinguished from a watchman or painter working on her while she is out of commission).

(e) That the ship have a company of persons contributing to her operation, of whom the person in question in one.

If the foregoing determinations are in the affirmative, the person so employed is a member of the crew.

The conclusion that one is a member of the crew is not defeated if the fact be:

(1) That his labors involve the same muscular efforts which would be involved in accomplishing a similar task on land.

(2) That his inexperience does not permit putting him at the work requiring the skill of an able seaman.

(3) That the voyage is short, and his employment by the master is oral.

(4) That the workman is paid a compensation out of which he pays for his own food and lodging in place of the ship paying him a reduced sum of money and furnishing his keep.

John Schumann was unquestionably a member of the crew of the Koal Kraft. The respondent as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act had no jurisdiction to make an award for compensation or bar a suit for damages for the death of Schumann. The award should be permanently enjoined.

The decree of the District Court enjoining the award was right.

The order of reversal made by the Circuit Court of Appeals should be vacated and set aside. That is the relief we ask.

Respectfully submitted,

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HAYES MCKINNEY,
Counsel for Petitioners.

APPENDIX.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

"Sec. 1. *Short title.* This chapter may be cited as 'Longshoremen's and Harbor Workers' Compensation Act.' (Mar. 4, 1927, c. 509, § 1, 44 Stat. 1424, 33 U. S. C. A. c. 18, § 901.)"

"Sec. 2. *Definitions.* When used in this chapter—

"* * * (3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"* * * (7) The term 'deputy commissioner' means the deputy commissioner having jurisdiction in respect of an injury or death.

"* * * (12) 'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein. * * * (Mar. 4, 1927, c. 509, § 2, 44 Stat. 1424, 33 U. S. C. A. c. 18, § 902.)"

"Sec. 3. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, § 3, 44 Stat. 1426, 33 U. S. C. A. c. 18, § 903.)"

"Sec. 9. * * *. *Compensation for death.* If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: * * * (Mar. 4, 1927, c. 509, § 9, 44 Stat. 1429; as amended June 25, 1938, c. 685, § 6, 52 Stat. 1166, 33 U. S. C. A. c. 18, § 909)."

"Sec. 19. * * * *Procedure in respect of claims.* (a) Subject to the provisions of section 13 of this chapter a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim. * * * (Mar. 4, 1927, c. 509, § 19, 44 Stat. 1435, as amended June 25, 1938, c. 685, § 9, 52 Stat. 1167, 33 U. S. C. A. c. 18, § 919.)"

"Sec. 21. * * *. *Review of compensation orders.* (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in

ubdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

"(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage. * * * (Mar. 4, 1927, c. 509, § 21, 44 Stat. 1436, 33 U. S. C. A. c. 18, § 921.)"

COMPLEMENT OF OFFICERS AND CREW.

"§ 222. *Complement of officers and crew of passenger vessels; penalties.* No vessel of the United States subject to the provisions of this chapter or chapters 14 or 15 or to the inspection laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew including certificated lifeboat men, separately stated, as may in the judg-

ment of the local inspectors who inspect the vessel be necessary for her safe navigation. The local inspectors shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew including certificated lifeboat men, separately stated, which may be changed from time to time by indorsement on such certificate by local inspectors by reason of change of conditions or employment. Such entry or indorsement shall be subject to a right of appeal, under regulations to be made by the Secretary of Commerce, to the supervising inspector and from him to the Supervising Inspector General, who shall have the power to revise, set aside, or affirm the said determination of the local inspectors.

"If any such vessel is deprived of the services of any number of the crew including certificated lifeboat men, separately stated, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage: *Provided*, That the master shall ship, if obtainable a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew including certificated lifeboat men, separately stated, to the local inspectors within twelve hours of the time of the arrival of the vessel at her destination, he shall be liable to a penalty of $50. If the vessel shall not be manned as provided in this section, the owner shall be liable to a penalty of $100, or in case of an insufficient number of licensed officers to a penalty of $500. (R. S. § 4463; Apr. 2, 1908, c. 123, § 1, 35 Stat. 55; Mar. 3, 1913, c. 118, § 1, 37 Stat. 732; Mar. 4, 1915, c. 153, § 14, 38 Stat. 1182; May 11, 1918, c. 72, § 1, 40 Stat. 548; June 30, 1932, c. 314, § 501, 47 Stat. 415, 46 U. S. C. A. Chap. 11, § 222)."

Shipping Articles.

"§ 564. *Shipping Articles.* The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

* * *

(R. S. § 4511; Mar. 3, 1897, c. 389, §19, 29 Stat. 691; Feb. 14, 1903, c. 552, 32 Stat. 829; Mar. 4, 1913, c. 141, 37 Stat. 736, 46 U. S. C. A. chap. 18, § 564.)"

"§ 574. *Shipping Articles for Vessels in Coasting Trade.* Every master of any vessel of the burden of fifty tons or upward, bound from a port in one State to a port in any other than an adjoining State, except vessels of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman on board such vessel except such as shall be apprentice or servant to himself or owners, declaring the voyage or term of time for which such seaman shall be shipped. (R. S. § 4520, 46 U. S. C. A. chap. 18, § 574.)"